IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL Nos. 820 of 2000

to

FIRST APPEAL No 844 of 2000

with

CIVIL APPLICATION NOS. 5519/2000 TO 5543/2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

and

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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ORIENTAL INSURANCE CO.LTD.

Versus

GANESHLAL NATHUJI CHAUDHARY

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Appearance:

MR KK NAIR for Petitioner

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CORAM : MR.JUSTICE J.N.BHATT

and

MR.JUSTICE K.M.MEHTA

Date of decision: 26/09/2000

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE J.N.BHATT)

In this group of 25 appeals, under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as `the new Act'), the appellant original opponent No. 3, The Oriental Insurance Company Ltd. - insurer has challenged the legality and validity of the common judgement rendered by Motor Accident Claims Tribunal, Morbi of Rajkot District, recorded on 31.1.2000, whereby, 18 injured persons and legal heirs and representatives of 7 deceased victims of road accident came to be awarded compensation of different amounts in different petitions holding that the driver of a motor truck GQA 5644 was rash and negligent and responsible for the accident and owner of the truck is, vicariously, liable and the insurer is bound to indemnify the insured owner of the vehicle with interest and cost in view of the insurance policy at Exh. 165 and the provisions of the Act.

2. There were 25 claim petitions. Seven persons sustained fatal injuries in the accident. The legal heirs and representatives deceased victims of road accident claimed compensation by filing seven claim petitions MACP Nos. 192 of 1991 to 198 of 1991 against which First Appeal Nos. 820 of 2000 to 826 of 2000 have been filed. In so far as the injured claimants are concerned, they had filed MACP Nos. 199 of 1991 to 215 of 1991 and MACP No. 235 of 1991 against which First Appeal Nos. 827 of 2000 to 844 of 2000 have been filed at the instance of the original opponent No. 3 insurer of the offending truck by invoking the aid of the provisions of Section 173 of the new Act.

3. Unfortunate road accident which took toll of seven persons and caused injuries to several other persons, out of whom 25 persons filed claim petitions occurred on 11.3.1991 between 2.00 and 3.00 p.m. on Rajkot-Ahmedabad highway near Bhalgam bus-stand. The deceased and the injured claimants were sitting along with their goods in motor truck GQA 5644 driven by Ganeshlal Nathuji Chaudhary and owned by Jivrajbhai Lalchandbhai Malu of Mahalaxmi Transport which was proceeding on Rajkot-Ahmedabad highway towards Ahmedabad side. The truck was driven in a rash and negligent manner. As a result of which when the truck reached near bus stand of village Bhalgam and Thikariyadi, the driver of the truck lost control over the vehicle and it went off the road and turned turtle culminating into death of

seven persons and injuries to several other occupants sitting in the goods on trucks at the relevant time.

3. The original claimants have, inter alia, contended that they were travelling in the offending truck at the relevant time along with their goods as they were doing business of selling vegetables. It was their contention that the accident was occurred on account of gross negligence and flagrant carelessness on the part of the driver of the truck which culminated into serious road tragedy. Injured persons were shifted to the hospital for treatment where deceased, on being shifted to the hospital, were declared to be dead. The claimants who are injured have sustained injury of varying gravity. Some of them sustained permanent partial disablement. The driver of the offending truck was Ganeshlal Nathuji Chaudhary. The truck was owned by Jivrajbhai Lalchandbhai Malu who was running Mahalaxmi Transport and the present appellant The Oriental Insurance Company Ltd. was the insurer. The claimants therefore filed 25 claim petitions before the Motor Accident Claims Tribunal, Morbi of Rajkot District on 10.9.1991 on the ground that the driver of the truck was fully responsible for the accident in question and therefore, the truck owner is vicariously, liable and since it was insured with the original opponent No. 3-appellant herein, they claimed compensation from all the three original opponents.

4. Original opponent No. 1, driver of the offending truck, though served, did not appear and contest the claim. Original opponent No. 2 appeared and resisted the claim petition by filing written statement at Exh. 16 and adopted the same written statement in other claim petitions whereas original opponent No. 3 insurer appeared and resisted the claim petitions by filing written statement at Exh. 18 which is also common written statement in all the petitions. The version of the owner of the truck has been that the driver of the truck was not rash and negligent and responsible for the accident whereas, the Insurance Company has taken a special defence. It has been contended by the insurer that the deceased and the insured persons were travelling in the offending truck at the relevant time as illegal passengers and therefore, the risk of such persons was not covered under the insurance policy. Since the driver had, unauthorisedly, permitted the passengers to travel in goods vehicle, there was a breach of terms and conditions of the policy and therefore, the insurer cannot be fastened with the liability.

5. Upon assessment and appraisal of the oral

evidence led by the claimants, since no oral evidence was led by the opponents and, also, documentary evidence placed on record, to which reference may be made by us at appropriate stage, hereinafter, the tribunal rejected the contention raised on behalf the Insurance Company insurer and awarded amounts of compensation to different claimants, differently, depending upon the facts of the case with interest at the rate of 12% per annum from the date of application till payment by a common judgement dated 31.1.2000 which is under challenge in this group of 25 appeals under Section 173 of the new Act at the instance of the insurer original opponent No. 3.

6. It may be stated, at the outset, that following only contention advanced before us by the learned advocate appearing for the appellant original opponent No. 3 insurer and no other contention has been advanced on the quantification of damages.

> "That the Tribunal has committed serious error of law in holding the insurer liable for the payment of compensation since there was a breach of terms and conditions of the insurance policy as the deceased and injured persons were travelling in the offending truck at the relevant time, unauthorisedly, and illegally.

7. In support of this contention, we have been taken through the relevant evidence and the provisions of the new Act. Since the accident occurred after introduction of the new Act, the merits of the appeals are required to be examined in the light of the provisions of the new Act, at the admission stage. Learned advocate for the appellant places at our disposal copies of the entire record placed and relied on by the Tribunal, for consideration of the merits. He had taken us through testimonial as well as documentary evidence and also, the relevant proposition of law in course of his submissions before us at the admission stage.

8. The claimants are examined before the Tribunal at Exh. 141 onwards. The injured claimants Lilaben Dahyabhai is examined at Exh. 141. She is one of the claimants in original claim petition MACP No. 200/91. She has stated in her evidence that she was travelling in the offending truck at the relevant time with her husband, her mother-in-law, her daughter and other persons, along with their household goods. It is very clear from her evidence that all of them were travelling as owner of the goods loaded in the truck for which fare was fixed by her husband who, unfortunately, succumbed to

serious injuries sustained in a road accident. Her husband was doing business of selling vegetable and was earning Rs. 2000/- per month. He was aged about 40 years at the relevant time. She and her daughters were helping the deceased in selling vegetables. She had sustained serious injuries. Her daughters had also sustained serious injuries.

9. We have, dispassionately, examined the evidence of the other claimants and it is a common contention propounded in the deposition of the claimants that they were travelling at the relevant time in the offending truck along with their goods for which the fare was paid. It is not that they were travelling with limited household items but it is noticed, conclusively, that they were travelling along with their luggages and goods at the relevant time on payment of fare. This part of the evidence of the claimants has remained uncontrovertible. The respondents have not led any other evidence. The evidence of the claimants is also verified by the recitals incorporated and articulated in the panchnama. The conclusion of the Tribunal, therefore, that the deceased and the injured claimants were travelling along with their goods at the relevant time as owner of the goods on payment of fare to the driver is quite justified and is supportable from the evidence on record which has not been controverted or rebutted. We are, therefore, in full agreement with the conclusion recorded by the Tribunal on this point.

10. Since we are dealing with the sole contention raised by the appellant so far in this group of appeals, we do not divulge ourselves on the question of negligence or quantification of damages. The contention which has been advanced before us that the Insurance Company is fastened with the liability should have been absolved from the payment of compensation is found, from the proved facts on record and the relevant proposition of law, unsustainable and meritless. Therefore, it is required to be rejected.

11. The insurance policy in respect of the offending truck is produced, at Exh. 165. It was effective and valid for a period commencing from 1.3.1991 to 28.2.1992 whereas the accident in question occurred on 11.3.1991. Certified copy of panchnama dated 11.3.1991 recorded at 6.45 p.m. on the same day of the accident is produced at Exh. 29. The permit from the R.T.O. in respect of the offending truck has been produced at Exh. 233 and 234. We have gone through the copies of the documents placed

on record by the learned advocate for the appellant during the course of submissions. Reliance is also placed on the terms and conditions of the insurance policy at Exh. 165. The main reliance is on the restrictive clause in the policy which says that the policy does not cover clause (3) (use for carrying passengers in the vehicle except employees (other than driver) not exceeding six in numbers coming under the purview of W.C. Act, 1923). It is, therefore, contended that there is a restrictive clause and limitation as to use of the vehicle and since the passengers were allowed to travel along with their personal effects upon payment of fare is a breach of the policy. It was further submitted that only six employees were permitted falling within the purview of W.C. Act, 1923. We have seen from the policy that the column showing the number of persons/passengers permitted to travel in the insured truck is kept blank for which there is no explanation as nobody is examined on behalf of the insurer. Apart from that , there is one another important endorsement and clause which we have noticed in the insurance policy which reads as under: -

> "Insured is not indemnified if the vehicle is used or driven otherwise than in accordance with this Schedule. Any payment made by the Company by reason of wider terms appearing at the certificate in order to comply with the Motor Vehicles Act, 1988, is recoverable from the insured. See the clause headed "AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY"
>
> Save as by this Endorsement expressly agreed nothing herein shall modify or affect the rights and liabilities of the insured or the Company respectively under or in connection with this policy."

12. It, therefore, shows, evidently, that in the event of payment made by the Company to the tort victims in order to comply with the Motor Vehicles Act, 1988, is, specifically, provided to be recoverable from the insured. Undoubtedly, this would mean that apart from the liability arising under the terms and conditions of the insurance policy, if the insured is obliged to pay the compensation or any payment made by the Company by reason of wider terms in the certificate or in order to comply with the Motor Vehicles Act, 1988, shall be recoverable from the insured like that the owner of the vehicle covered under the policy. It is, also, very,

clear that except this endorsement, expressly, agreed nothing there shall modify or affect the rights and liabilities of the insured or the Company, respectively, under or in connection with the policy. So far the clause "avoidance of certain terms and right of recovery" forming part of insurance policy plays a significant role more so when an Insurance Company seeks to avoid its liability for the payment of compensation to the victims. This clause is, popularly, worded in the insurance "AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY".

13. The aforesaid clause or endorsement would, undoubtedly, preclude the insured of the vehicle involved in the accident to avoid or resist the rightful claim due and payable under the Act to a victim of tort of a vehicle which is insured with the insurer committed on account of use of the vehicle insured with the insurer. This clause being arisen for consideration only in case of a dispute between the insured and insurer. In our opinion, the insertion and the employment of the aforesaid clause or endorsement and that too, by calling it by a notice carries the purpose and philosophy behind it and more so when the accident is governed by the new Act why should third party be allowed to suffer his prime design and desideratum of the provisions of the new Act. The view which we are inclined to take at this juncture is very much reinforced by the observations made by the Hon'ble Apex Court in the case of AMRIT LAL SOOD & ANR. VS. KAUSHALYA DEVI THAPAR & ORS. decided on 17.3.1998 reported in 1998(2) G.L.R. 1788 wherein the Hon'ble Apex Court had to examine almost identical clause and endorsement incorporated in the insurance policy. It has been held, upon the examination and assessment of such a clause in the insurance policy, by the Hon'ble Apex Court that the above clause does not enable the Insurance Company to resist or avoid the claim made by the claimants. Such a clause arises for consideration, only, in a dispute between the insurer and the insured. No doubt, in that case the question whether under the said clause the insurer's claim for repayment from the insured was not gone into and was kept open. Therefore, in AMRIT LAL SOOD's case (supra) the Hon'ble Apex Court, in the result, held that the Insurance Company is, also, liable to meet with the claim of the claimants and satisfy the award passed by the Tribunal and modified by the High Court. The judgement of the High Court of Himachal Pradesh in so far as it excluded the Insurance Company from the liability was set aside. The award recorded by the Division Bench of the Himachal Pradesh High Court was held to be enforceable against the Insurance Company and the appeal was allowed to that extent. The view,

therefore, which we have already propounded hereinabove is, succinctly, substantiated and reinforced by the clear observations of the Hon'ble Supreme Court in the case of AMRIT LAL SOOD (supra). Paragraph 13 stipulates clause incorporated in that case which reads as under:-

"In the policy in the present case also, there is a clause under the heading "AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY" which reads thus:

`Nothing in this policy or any endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939, Sec. 96. But the insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions."

14. In the present case, the policy at Exh. 165 at the bottom highlighting with the expression "important notice" the endorsement and clause as reproduced above. Whereas in the present case, apart from the aforesaid endorsement, the new Act is applicable. Under the provisions of Section 147 of the new Act, insurance liability under Section 147, third party risk including the passengers travelling in goods carriage is covered. In view of the amended provisions under the new Act, insurance policy covering third party risk is, also, not required to exclude gratuitous passengers in a vehicle. The old Act of 1939 is now replaced by new Act of 1988. Section 95 in the old Act which corresponds to Section 147 of the new Act has been, materially, modified by the legislature, designedly, in NEW INDIA ASSURANCE COMPANY VS. SATPAL SINGH reported in AIR 2000 SC 235. It has been specifically held that under the new Act an insurance policy covering third party risk is not required to exclude gratuitous passengers in a vehicle, no matter that the vehicle is of any type or class. The obvious result would be the decision rendered under the old Act in relation to gratuitous passengers are of no avail while considering the liability of the insurance company in respect of any accident which occurred after the introduction of the new Act of 1988. In that case, compensation was claimed for death of 10 years old girl in a road accident which occurred on 11.3.1990 when deceased was travelling in a truck. The Tribunal had passed award even against the insurer which was challenged before the High Court and the Division Bench of the High Court dismissed the appeal filed by the Insurance Company but allowed the other appeals by

doubling the compensation amount. The Insurance Company, therefore, had approached the Hon'ble Supreme Court and even at the admission stage, the appeal came to be dismissed filed by the insurer holding that in appeal there was no scope for absolving the Insurance Company from the liability. The decision of the Hon'ble Supreme Court in MALLAWWA VS. ORIENTAL INSURANCE CO. LTD. reported in AIR 1999 SC 589 is relied on by the Insurance Company in Satpal Singh's case (supra) to disclaim liability on the premise that the victim of the accident was gratuitous passenger in the vehicle covered by the insurance policy. However, the Hon'ble Supreme Court in Satpal Singh's case (supra) explained the said decision and held that under the new Act insurance policy covering third party risk is not required to exclude gratuitous passengers in a vehicle, no matter that the vehicle is of any type or class. It was, therefore, held that the decisions recorded under the old Act in respect of gratuitous passengers claimed for compensation were of no avail while considering the liability of the Insurance Company in respect of any accident which took place after the introduction of the new Act.

15. After having taken into consideration the factual position emerging from the record of the present case copies whereof were placed before us in course of admission hearing of the matters and the aforesaid celebrated proposition of law, we have no hesitation in holding that the sole contention raised before us is meritless and group of 25 appeals is required to be dismissed at the threshold. Since no other contentions are raised and the sole contention is found without any substance, the appeals shall stand dismissed at the admission stage with no order as to costs.

16. The amount of Rs. 25,000/- deposited before this court in each case along with the appeal under Section 173 of the Act is ordered to be transmitted, immediately, to the Tribunal concerned for passing necessary orders for being disbursed to the claimants.

In view of the common judgement passed in this group of 25 appeals, no orders are passed on the Civil Applications.

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